90-390

Docket No. 89-5515(L)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

FRANK E. BUTLER, III,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

WHETHER THE FOURTH CIRCUIT UNITED STATES COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURTS ADMISSION INTO EVIDENCE OF AN ACCOUNTING FIRMS LETTER CONTAINING OPINIONS OF ITS AUTHOR THAT CO-CONSPIRATORS (NOT THE DEFENDANT BUTLER) WERE GUILTY OF CRIMINAL RICO, WIRE FRAUD, TRUTH-IN-LENDING AND OTHER CRIMINAL VIOLATIONS. THE DECISION OF THE FOURTH CIRCUIT HAS CREATED A CONFLICT WHICH THIS COURT SHOULD RESOLVE.

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties.

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No. 89-5515(L)

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UNITED STATES

OCTOBER TERM 1990

FRANK E. BUTLER, III,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

The Petitioner, Frank E. Butler, III, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit affirming his final judgment of conviction of violations of Title 18

U.S.C. §1343 (Wire Fraud) (Counts 1-36); 18 U.S.C. §152 (Bankruptcy Fraud) (Counts 37-46); 18 U.S.C. §1961, 1962(c), 1963 (RICO) (Count 47); 18 U.S.C. §§1961, 1962(d), 1963 (Conspiracy) (Count 48); and 18 U.S.C. §1014 (False Statements) (Counts 64-71), entered in the United States District Court for the Eastern District of Virginia, Norfolk, Virginia.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Fourth Circuit was filed on May 21, 1990, and is printed in the Appendix to this Petition (App. 1a).

The Opinion of the Fourth Circuit Court of Appeals was filed on May 21, 1990, and is printed in the Appendix to this Petition.

The judgment of the United States District Court for the Eastern District of Virginia was filed on January 9, 1989, and is printed in the Appendix to this Petition. (App. 32a).

JURISDICTION

1. The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the Trial Court was invoked pursuant to 18 U.S.C. §2331.

2. The date of the judgment of decree sought to be reviewed is May 21, 1990.

APPLICABLE STATUTES AND

CONSTITUTIONAL PROVISIONS INVOKED

Federal Rules of Evidence 801(d)(2)(E)

Federal Rules of Evidence 704(B)

Federal Rules of Evidence 403

STATEMENT OF THE CASE

1. The Nature of the Case and Proceedings Below

A 73 Count Indictment was returned in the United States District Court for the Eastern District of Virginia, Norfolk Division, against William R. Runnells, Jr., Marika Cody Runnells, Ross E. Schumann, Owen R. Thornton and Frank E. Butler, III.

Trial commenced on September 14, 1988 and the jury returned its verdict on November 28, 1988.

On January 9, 1989, the District Court sentenced the Petitioner to a total term of eight years confinement and he was ordered to pay $100,000 in restitution.

The Fourth Circuit United States Court of Appeals rendered its decision on May 21, 1990.

2. Statement of Facts

A. Background

Fugitive, co-defendants, William R. Runnells, Jr., and his wife, Marika Lody Runnells, were the originators and owners of Landbank Equity Corporation and the schemes that are the subject of the Indictment. William Runnells directed and controlled the affairs of Landbank, as well as all of its numerous incorporated and non-incorporated affiliates and subsidiaries.

The defendant, Frank E. Butler, III, was a practicing attorney in the law firm of Butler, Payne and Griffin, which provided legal services including real estate closings for Landbank. Butler was not an employee, officer, or director of Landbank at the

pertinent times herein and had engaged in a reputable law practice for many years as a partner with his father and others. Butler also served honorably as a substitute General District Court Judge for Virginia Beach for many years.

B. Landbank's Business Operations

Landbank's primary business was the origination, sale and servicing of second mortgages. Those entire procedures were totally performed by Landbank's officers and regular employees. Neither the defendant, Butler, or his law firm had any participation therein. Landbank had its own office building and Butler's law firm had their separate law office elsewhere, where they had engaged in a busy general law practice for many years prior to Landbank becoming one of their

clients.

It was not until a loan closing that the law firm of Butler, Payne & Griffin first came into the Landbank mortgage process. Only when the approved loan was ready for closing were the attorneys' services utilized; and then all loans were closed according to Landbank's written "closing instructions" given the attorneys.

C. The Earlier Period of Landbank Before its Fraudulent Practices

Defendant, Butler, had met William Runnells in the mid-seventies and had rendered some minor legal services to Runnells from time-to-time. In fact, they had become somewhat friendly, and, on a small scale, had engaged in a joint enterprise for a couple of years of buying properties at

foreclosure, repairing and thereafter selling the same. During these early years, when defendant, Butler, other than as an attorney, had some participation in the affairs of Landbank, there were no improper practices, or fraud, and, indeed, Landbank's obligations to the banks, and others, were honored and fulfilled.

By May or June 1982, however, some differences arose between defendant, Butler, and the Runnells. Accordingly, in June 1982, Butler resigned and withdrew from that point from any participation in any of Landbank's business. Thereafter, Butler's only association with the business of Landbank was as an attorney in his law firm.

D. Warehousing of Loans

After the loans were closed,

the loan package was returned from the law offices to Landbank's offices. The Landbank officials entered into a relationship with Perpetual Bank for the warehousing of the loans. Under that arrangement, the "closed loan package" was sent by Landbank personnel to the Perpetual American Bank. Later the loans were "pooled" into packages of loans and, in turn, sold on the "secondary market" to investors that is, financial institutions throughout the country. The warehousing bank held the loans assigned to them by Landbank as collateral against a line of credit from which Landbank withdrew operating funds.

Butler had no participation in this loan hypothecation and warehousing procedure by Landbank.

E. Fannie Mae Period

In 1982, after Butler had resigned, Landbank commenced doing business with the Federal National Mortgage Association ("Fannie Mae" or FNMA).

Fannie Mae ultimately determined that Landbank's practices did not comply with them, and on August 19, 1983, FNMA terminated "all selling arrangements with Landbank". Nevertheless, Landbank continued to misrepresent to investors that they had seller/ servicer approval from Fannie Mae, and that all loans conformed to FNMA documentation and that the appraisals met FNMA guidelines. Butler, at no time had any participation in any of the business or contact between Landbank and Fannie Mae, and/or the investors

consequently, Butler never made any representations or misrepresentations to any investor in this regard.

F. Landbank's Fraudulent Schemes

After Butler had resigned from Landbank, the Runnells created, perpetrated and conducted their fraudulent schemes.

Landbank's fraudulent practices in the origination, sale and servicing of second mortgages was extensive and continuous.

Landbank engaged in "insider loans" by "selling" properties to insiders, such as friends, family and employees. These loans were then sold to investors, generating cash that kept Landbank operating. Many employees, who were deceived and innocently allowed their names

to be so used, were assured by the Runnells, Greene, and Hilliard that there was nothing improper and that such employees were not doing anything wrong.

All of the misrepresentations to investors and fraudulent practices of Landbank were the "brainchild" of William and Marika Runnells and were carried out internally at Landbank by its officers and the several employees, Greene, Hilliard and Simoneau.

In the trial of this matter, the United States introduced a letter from an accounting firm which contained opinions of its authors that Landbank and its agents and employees committed criminal acts. Over strenuous defense objection, the District Court admitted this letter. (App. 45a). Defendant

Butler had not been a member of the Board of Directors of Landbank for nearly 3 years and had never seen the letter.

ARGUMENT

I. THIS CASE REPRESENTS A COMPELLING QUESTION OF LAW WHEREIN A CONFLICT EXISTS BETWEEN COURTS OF APPEAL REGARDING THE ADMISSIBILITY OF A DOCUMENT WRITTEN BY A NON-CO-CONSPIRATOR AND DELIVERED TO AN ALLEGED CO-CONSPIRATOR AS EVIDENCE OF INTENT AND KNOWLEDGE, AND THE ADMISSION OF THE ACCOUNTING FIRM'S LETTER WAS IN CONTRAVENTION OF PRECEDENT IN THE SECOND CIRCUIT UNITED STATES COURT OF APPEALS AND A CONFLICT EXISTS.

Under appropriate circumstances, a conflict among Courts of Appeal may compel this Honorable Court to review a decision of an intermediate appellate Court to ensure uniformity of federal law and resolve intercircuit conflicts.

F.T.C. v. Flotill Products, 88 S. Ct. 401, 389 U.S. 179, 19 L. Ed. 2d 398 (1967).

The Court below admitted a June 14, 1985 letter from an accounting firm to Landbank's Board which stated, in pertinent part:

> During the course of our engagement for Landbank Equity Corporation ("Landbank") certain documents we have reviewed and statements made to us by Landbank employees have indicated that Landbank and some of its employees and agents may have committed violations of federal and state laws in the past. These possible violations seem to include, (without attempting an exhaustive list): obtaining money by fraud, fraud by wire and by mail, violation of the federal RICO Act (18 U.S.C. 1961), and criminal violations of the Truth in Lending Act....

(App. 41a).

The letter further indicated the accountants' opinions of the likelihood of discovering evidence of further legal violations,

commented on "evidence indicating that substantial violations of the law may have occurred," and commented on the detrimental reliance by investors in the past on false information furnished by Landbank). The Government's evidence established that the letter was presented by Goodman & Co. representatives at a meeting at Landbank attended by Marika Runnells, Ross Schumann, T. C. Lee (another Landbank employee), two Richmond attorneys representing Landbank, three accounting representatives from Goodman & Co., and an attorney representing Goodman & Co., on or about June 19, 1985. The Goodman & Co. representative testifying at trial with regard to this letter, Donald Dale, testified that the

defendant Butler was not present at the meeting, that he had "never seen Mr. Frank Butler before today," and that the only attorneys of whom he was aware who were representing Landbank in this matter were the two attorneys present at the June 19, 1985 meeting and who were from Richmond.

Furthermore, the letter was addressed to the Landbank "Board of Directors," (App. 41a) and the defendant Butler had not been involved with the Board as a Director for almost 3 years.

Defendant respectfully submits that in admitting this letter on issues of knowledge and intent imputed to alleged co-conspirators of defendant, Butler, on the basis of the co-conspirator act and declaration exception, in spite of

defendant's absence from the meeting and total lack of connection with the letter, the district court committed reversible error.

First, the co-conspirator act/declaration exception comprises "a statement [or an act] by a co-conspirator of a party during the course and in furtherance of the conspiracy." Fed. R. Evid. 801(d)(2)(E). The subject letter is not a statement by a co-conspirator; rather, it is a statement by accountants to persons who are alleged to have been co-conspirators.

On almost identical facts, United States v. Morello, 250 F.2d 631, 634 (2nd Cir. 1957) held that it was error to admit a letter written by a non-co-conspirator to an alleged co-conspirator "not by

the authority or in the presence of" the defendants:

> This basis of admission is untenable because this was a letter sent to an alleged co-conspirator: it was not an act or declaration of or by a co-conspirator.

Additionally, the subject letter was generated and created entirely and solely by the accountants, and not by any alleged co-conspirator, was delivered at the accountants' instance, represented opinions and impressions of the accountants only, and was therefore simply a unilateral proffer by the accountants and could not be said to have been a statement or act by co-conspirators done in furtherance of the conspiracy.

The letter simply could not affect the defendant Butler's knowledge or intent, which defendant had no connection with or knowledge

of the letter. In addition, admission of the letter violated the prohibitions against expert testimony in Federal Rule of Evidence 704(b) with regard to criminal knowledge, or intent and related issues.

Otherwise stated, it is simply erroneous to permit an expert witness in a criminal case to testify as to opinions regarding whether or not the defendants committed offenses. See United States v. Lueben, 812 F.2d 179, 184 (5th Cir. 1987) (noting that "an expert may not express an opinion on a conclusion of law" in a criminal case). The Government could not seriously contest the prejudice inherent in such a letter. Qualified and expert accountants, through the letter and testimony,

were pointing an accusatory finger at the defendants for the commission of the same serious offenses for which the defendants were precisely on trial in the instant case.

Furthermore, whatever probative value this letter represented, even if, arguendo, properly received for limited purposes of knowledge and intent, was minimal, admitted as it was for any knowledge and intent regarding offenses in July and August, 1985, a tiny part of this massive indictment. Only four Counts (33-36) in this voluminous 73-Count Indictment were even alleged to have occurred after the date of this letter.

On the other hand, by hearing the enumeration of offenses alleged by the accountants in their letters, including wire fraud and RICO, the

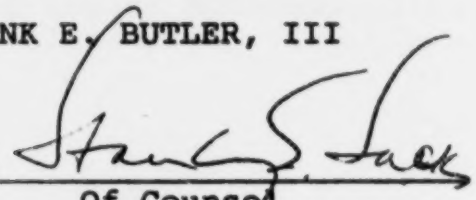
letter had the potential prejudice and danger of tainting the jury's thinking with regard to all of the Counts for which defendant Butler was on trial, with its numerous references to violations of the law, and thus should have been excluded, pursuant to the balancing test mandated under Federal Rule of Evidence 403. During oral argument in the Fourth Circuit, the Court commented that this was a close case. It is submitted that in a close case, the admission of highly prejudicial documentary evidence should support the conclusion that only reversal is appropriate to cure the error.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that the Petition for Writ of Certiorari to this Honorable Court should be granted.

Respectfully submitted,

FRANK E. BUTLER, III

By: 
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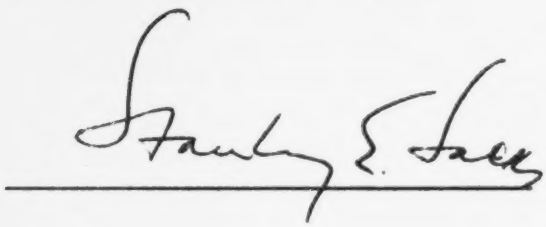
CERTIFICATE OF SERVICE

I hereby certify that five true copies of the Writ of Certiorari were mailed this 20th day of August, 1990 to Ms. Sara Criscitelli, Appellate Section, Criminal Division, U.S. Department of Justice, 10th St. and Constitution Avenue, N.W., Washington, D.C. 20530; James Metcalfe, Esquire, Office of the United State Attorney, Walter E. Hoffman U.S. Courthouse, 600 Granby Street, Norfolk, Virginia 23510; Joseph Fisher, III, Esquire, and Justin Williams, Esquire, Office of the United States Attorney, 1101 King Street, Alexandria, Virginia 22314.



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UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 89-5515

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

FRANK E. BUTLER, III,

Defendant - Appellant.

No. 89-5515

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

OWEN R. THORNTON,

Defendant - Appellant.

Appeal from the United States
District Court for the Eastern

District of Virginia, at Norfolk. J. Calvitt Clarke, Jr., District Judge. (CR-88-53-N)

Argued: February 7, 1990
Decided: May 21, 1990

Before CHAPMAN and WILKINSON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

ARGUED: Stanley E. Sacks, Andrew Michael Sacks, SACK & SACKS, Norfolk, Virginia; Benjamin Thomas Reed, Norfolk, Virginia, for Appellants. Sara Bradkin Criscitelli, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. ON BRIEF: Henry E. Hudson, United States Attorney, Joseph A. Fischer, III, Assistant United States Attorney, Justin W. Williams, Assistant United States Attorney, Alexandria, Virginia; James A. Metcalfe, Assistant United States Attorney, Norfolk, Virginia; Mark A. Adler, Rachel Ballow, Third-year Law

Student, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Frank E. Butler, III, and Owen R. Thornton appeal their convictions by a jury in connection with their involvement in the business activities of the now bankrupt Landbank Equity Corporation, an issuer and seller of mortgage-backed loans. Butler, an attorney, and Thornton, an accountant, challenge their respective convictions on charges of wire fraud, bankruptcy fraud, bank fraud, and participating in Landbank's affairs through racketeering (RICO), on various grounds, including sufficiency of

the evidence. They also appeal the district court's denial of their motion for mistrial in connection with co-defendant's suicide after the jury was impaneled. We find that defendants' assignments of error are without merit and that there is substantial evidence to sustain their convictions. The judgments of conviction are therefore affirmed.

I.

Landbank Equity Corporation was incorporated in September 1980 by William J. Runnells and Frank E. Butler, III for the purpose of making loans to consumers, generally secured by second mortgages, and then selling them on the secondary

mortgage market to various financial institutions. Butler was a stockholder and Landbank's first president until he sold his stock and resigned as an officer in 1982. Thereafter, he continued to perform legal work for Landbank including effectuating loan and real property closings, sending delinquency notices, handling foreclosures, and incorporating Landbank subsidiaries. Landbank was initially approved in July 1982 by Federal National Mortgage Association (FNMA) as a seller/servicer of equity loans and it subsequently sold approximately $20 million in such loans to FNMA. After FNMA terminated its agreement with Landbank following unsatisfactory random audits of Landbank loans, the company obtained

a bank "warehousing" line of credit which allowed it to originate loans, and enabled investors to purchase loans by means of wire transfers to the bank account. In September 1985 when Landbank filed for bankruptcy it had sold over $200 million worth of loans to commercial investors.

In April 1988 the grand jury returned a 73-count indictment against appellants and three Landbank officers, William R. Runnells, Jr., Marika Lody Runnells and Ross E. Schumann, Jr. William and Marika Runnells, who were the sole stockholders of Landbank and the alleged "masterminds" of the Landbank scheme, fled the jurisdiction. See United States v. Butler, 704 F. Supp. 1338, 1341 (E.D. Va. 1989). Schumann committed

suicide after the jury was impaneled but before opening arguments were heard in the case.

The indictment charged these individuals had used Landbank and its related companies in a scheme to defraud investors who purchased the loans originated by Landbank. The fraudulent activity took three forms, as summarized by the district court. See id. at 1342. First, Landbank "misrepresented the quality of its loans by falsifying credit applications, overstating the credit-worthiness of borrowers and the value of the mortgaged properties,...misrepresenting the insured status of the loans, ...conceal[ing] delinquencies in loan payments," and "misrepresent[ing] to potential

investors its historical delinquency rate." Id. Landbank also submitted to its investors allegedly false financial statements prepared by appellant Thornton.

Second, Landbank originated approximately 100 "insider" first mortgages, mostly on condominium units developed by Landbank-related companies, which recited the names of Landbank employees and family members of Landbank principals as sham borrowers. The loan documents, most of which named Butler as the closing attorney, were falsified to show downpayments that were never made and to overstate borrower income levels and credit information. These loans were sold to investors as loans made to the named individuals. Landbank,

however, made the downpayments and subsequently received a deed-back of the properties from the straw borrowers. The loan closing were conducted at Butler's law firm by his secretaries and paralegals, allegedly with his authorization.

Finally, Butler allegedly transferred various pieces of real property owned by Landbank and its related companies, both prior to bankruptcy and after bankruptcy was declared by Landbank on September 17, 1985. Thornton allegedly withheld from the trustee in bankruptcy certain financial records relating to Landbank and its affiliate companies.

After an eight-week trial in which one hundred and twenty-eight witnesses testified, and after

nearly seven days of deliberation, the jury returned a verdict against both appellants. Butler was convicted on thirty-five counts of wire fraud in violation of 18 U.S.C. § 1343, nine counts of bankruptcy fraud in violation of 18 U.S.C. § 152, three counts of making false states to a bank in violation of 18 U.S.C. § 1014, one count of charging RICO conspiracy in violation of 18 U.S.C. § 1962(d), and one count charging racketeering activity in violation of 18 U.S.C. § 1962(c). The jury convicted Thornton on twenty-one counts of wire fraud in violation of 18 U.S.C. § 1343, one count charging a RICO conspiracy in violation of 18 U.S.C. § 1962(d), one count charging racketeering activities in violation of 18 U.S.C.

§ 1962(c), and one charge of making false statements to a bank in violation of 18 U.S.C. §1014. The district court denied appellants' numerous post-trial motions.

This appeal followed.

II.

Appellants contend that the district court erred in denying their motion for mistrial after co-defendant Schumann's suicide. On the Monday on which opening arguments were to have been heard in the case, Schumann failed to appear in court. The district judge continued the case until the following Thursday, informing the jury that it was necessary to investigate Schumann's absence. It was determined that he had committed

suicide during the intervening weekend. Butler filed a motion for mistrial. The district court denied the motion after hearing arguments from the parties. On appeal, Butler and Thornton argue that the court's failure to grant a mistrial was reversible error. They contend that Schumann's suicide could suggest to the jury that he was guilty and that, because Schumann was named with them in many of the same counts, an inference that Schumann was guilty on a particular count would unfairly prejudice them.

We disagree. First, it is not at all clear that the fact of the suicide was inherently prejudicial to appellants. Butler and Thornton did not dispute that Landbank "insiders" such as Runnells and

Schumann had committed fraud. Instead, both appellant sought to defend, at least in part, by placing the blame on the "insiders" who they claim masterminded the scheme. Butler and Thornton sought to argue that in their roles as attorney and outside accountant, respectively, they did not know of or participate in the fraudulent activities. On that theory, an inference of guilty on the part of Schumann based on his suicide was consistent with appellants' trial defense.

In any event, however, the district court carefully considered the possible effect of Schumann's suicide on the jurors and we decline to overturn its conclusions. As the court noted, these jurors had been extensively instructed to avoid

discussing the case with anyone and to refrain from reading any newspaper or other accounts relating to it. Thus this jury was less likely to have been tainted by any out of court discussion of the suicide than a new jury might have been. Indeed, there is no evidence in this record that any of the jurors had actually heard of the suicide prior to learning of it from the district judge.

The trial judge conducted individual voir dire of each of the jurors. He informed each of them of the suicide and then asked whether knowledge of that fact would raise any inference in his or her mind as to the guilt of co-defendants Butler and Thornton. The court concluded each interview by reminding the

juror that he or she was to decide the case as to Butler and Thornton only on the basis of evidence presented in the courtroom. The court excused one alternate juror but stated that it had "absolutely no reservation" about going forward with the rest of the jurors who "answered unequivocally...that they found no inference of guilt against [appellants] and that they could divorce themselves from any consideration of the suicide." Jury Selection Proceedings, Sept. 22, 1988, at 620.

The "trial judge will always be in a better position than the appellate judges to assess the probable reactions of jurors in a case over which he has presided" and "we ought to accept his judgment

unless we have a very strong conviction of error." United States v. Key, 859 F.2d 1257, 1264 (7th Cir. 1988) (quoting United States v. Bruscino, 687 F.2d 938, 941 (7th Cir. 1982) (en banc)). We decline to second-guess the determination made here by the district judge who "assess[ed] the partiality of [each] juror...in the face to face appraisal." United States v. Gaggi, 811 F.2d 47, 53 (2d Cir. 1987) (considering possible prejudice of jurors of murder of co-defendant during trial). See United States v. Goodman, 605 F.2d 870 (5th Cir. 1979) (upholding district court's refusal to grant a mistrial after suicide of co-defendant).

III.

Appellant Butler also contends that there is insufficient evidence to sustain his convictions. Butler's main argument, made in his post-trial motions and renewed on appeal, is that there is insufficient evidence that he "knew or willfully participated in any fraudulent scheme." Butler, 704 F. Supp. at 1346. We find, however, that taking the evidence in the light most favorable to the government, there is ample evidence to sustain the jury verdict. See Jackson v. Virginia, 443 U.S. 307, 319 (1979).

A.

As to the bank fraud and wire fraud counts, Butler contends that his only connection with the fraud

is that he was allegedly the closing attorney on the "insider" loans. He argues, however, that secretaries and paralegals prepared the loan documents for the mortgage closings and signed his name to the documents and "attorney certification letters." He contends that he was not present at or personally involved in the closings, and that he did not know that the borrowers were strawmen. The district court rejected this argument in its denial of Butler's post-trial motions and we agree with its reasoning. See Butler, 704 F. Supp. at 1346-47, 1349.

The evidence at trial showed that Butler was named as the closing attorney on most of the insider "straw loans," id. at 1349, and the

testimony of other witnesses undermined Butler's claim that he was unaware of the nature of these loans. The secretaries and paralegals who handled these loan closings testified that they were authorized to sign Butler's name to the documents. They understood that the insider loans were to be treated differently than other loans. For example, the borrowers did not come to the office to sign, but instead the law firm secretary would notarize the documents on Landbank's representation that the borrower had signed in its offices. The loans were also handled at mass closings in which there would be multiple loan packets for the same insider. Imelda Greene, the Landbank employee who originated the loan packets,

testified that at least one of the law firm secretaries who were responsible for these loan closings knew that the recited downpayments on the loan documents were not to be collected. One secretary even kept a chart of the insider loans visibly displayed on the wall in her office. In addition, it would have been clear to the closing attorney from the face of the loan documents that the properties were financed 100%.

By his own admission, Butler did close a sale of a property on which his son, Frank E. Butler, IV, was the straw borrower. Id. at 1349. In addition, the testimony of several Landbank employees supports the conclusion that Butler knew the nature of other specific insider loans. Former Landbank employees

Imelda Greene, William Duckworth and William Deal testified that, on several occasions, they had each discussed with Butler some issue in connection with the insider loan transactions. Id. Deal, who had unknowingly signed for six insider mortgage loans on which Butler was the closing attorney, testified that he complained about this to Butler and asked him to contact the lenders. According to Deal, Butler responded that "[I]t was a big mess, and a lot of his friends were involved in it" and "[t]here was nothing he could do." 23 Transcript of Trial Proceedings at 3749. Thurman Lea, an attorney on Landbank's staff, testified that Butler had reviewed indemnification letters which Lea had prepared to

allay the fears of Landbank employees whose names appeared on the insider loans.

Evidence of Butler's frequent and significant contact with Landbank and its principals also tends to undermine Butler's contention that, at most, he closed the loans, but he knew nothing of the arrangements that Landbank had with its borrowers and investors. Butler was involved in the initial incorporation of Landbank, appeared at its offices several times a week, participated in Landbank's Board of Director's meetings and, along with his law firm, garnered substantial legal fees from Landbank loan closings.

Although Butler contradicted some of this evidence in his

testimony at trial, it was within the providence of the jury to weigh his credibility against that of the other witnesses and believe or disbelieve his version of the facts. See Butler 704 F. Supp. at 1350. We agree with the district court that the jury verdict on these counts was amply supported by the evidence.

B.

We also find no merit in Butler's claim that there is insufficient evidence to support his convictions on the bankruptcy fraud counts. Butler contends, inter alia, that the properties he transferred after the date that Landbank declared bankruptcy were not within the estate of Landbank and that his purchase of properties

from Landbank subsidiaries and subsequent sale of them to third parties was not unlawful. The district court rejected all of these arguments when they were raised in Butler's post-trial motions. See id. at 1347.

The court noted that there was "extensive evidence" that the properties transferred by Butler had been owned by companies belonging to William Runnells which were merely his "alter egos." Id. at 1347. See also In Re Runnells, 815 F.2d 969, 970 (4th Cir. 1987) (holding that various subsidiaries owned by Runnells were "affiliates" within the meaning of an injunction prohibiting the transfer of property of the bankrupt, Landbank Equity Corp). The court concluded that

"[t]he jury could fairly find that the property belonged to Landbank in fact if not in name and that Butler knew of this." Butler, 704 F. Supp. at 1347. As to the properties which Butler himself acquired and then transferred, he is culpable because his action "had the effect of concealing the asset[s] of a debtor in bankruptcy," United States v. Center, 853 F.2d 568, 571-72 (7th Cir. 1988), or in contemplation of bankruptcy.

Finally, our review of the record satisfies us that there is sufficient evidence to support Butler's conviction on the RICO counts, see Butler, 704 F. Supp. at 1348, and we find no merit in his remaining assignments of error.

IV.

Appellant Thornton challenges the sufficiency of the evidence to support his convictions on the wire fraud and RICO counts. Thornton claims that the government failed to show that he had knowledge of Landbank's fraud or that his acts were intended to further its fraudulent purposes. We find that there is sufficient evidence to support the jury's verdict on all counts.

The government's case is based on evidence of Thornton's role in keeping Landbank's books and records and in preparing allegedly misleading audited financial statements that Landbank sent to investors to demonstrate its solvency and to promote its loan

packages. The evidence at trial tended to show that Thornton's inaccurate audit reports were part of a scheme to distort the character of Landbank's finances. Kathleen McGaughey, an auditor who examined Landbank's financial situation, an FBI agent who investigated Landbank, and another auditor who was retained by Landbank all testified at trial to inculpatory statements made by Thornton. These statements tended to show that he was aware of Landbank's activities and problems at the same time that he was publicly proclaiming to investors the accuracy of the financial statements and the financial health of the company. Information available during the time that these representations were being made,

such as overdraft information and delinquency reports, shows that Landbank's true situation was not as Thornton represented it to be.

Fred Smolen, an accountant-expert witness for the government, testified to various ways in which Thornton's financial representations were false. For example, amounts listed as income for the sale of loans failed to account for Landbank's repurchase promise and servicing obligations and thus overstated Landbank's income and net worth. The statements also did not reflect substantial foreclosure losses sustained by Landbank, by representing that the loans had been acquired by a Landbank subsidiary. (The minutes of the June 1984 meeting at which Thornton was

present reveal that it was Thornton's suggestion that Landbank hide foreclosure losses in this manner.) Thornton also failed to include certain other transactions between Landbank and it subsidiaries, some of which were ultimately found to have no legitimate business purpose.

Contrary to Thornton's assertion that he was ignorant of Landbank's investment activities, the evidence supports the conclusion that Thornton knew that his financial statements were being used to find investors for the loan packages. For example, the minutes of the June 1984 meeting include discussion of Landbank's warehousing arrangement by which it funded mortgages until they were purchased

by investors. Thornton's claim of ignorance is also undermined by evidence that he was frequently present at the Landbank offices and received a large part of his income from Landbank accounting work. The evidence also tends to show that Thornton was aware of the insider loans. He signed false employment verification forms in connection with them and had access to Landbank's books and records, which would have shown that Landbank rather than the employee was the actual payor. We find that there is ample evidence from which a rational jury could have concluded the Thornton was part of a "scheme or artifice to defraud" by the unlawful use of the wire. 18 U.S.C. § 1343.

We also conclude that there is

sufficient evidence to support Thornton's conviction on the count of conspiracy to commit racketeering activity. The facts and circumstances outlined above are sufficient for a jury to infer Thornton's participation in the conspiracy in connection with Landbank's fraudulent activities. See United States v. Norris, 749 F.2d 1116, 1131 (4th Cir. 1984) (in a conspiracy count, guilt may be inferred from the circumstances). Finally, we find no merit in Thornton's other assignments of error.

The judgments of conviction are therefore

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
June 11, 1990

No. 89-5515

US v. Butler

No. 89-5516

US v. Thornton

MANDATE

The judgment of this court dated 5/21/90 takes effect today.

JOHN M. GREACEN
CLERK

AO 245 (Rev 8/87) Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

FILED JAN 9 1990
CLERK, U.S. DISTRICT COURT
NORFOLK, VA

UNITED STATES OF AMERICA

V.

JUDGMENT IN A CRIMINAL CASE

FRANK E. BUTLER, III

CASE NUMBER: CR. 88-53-N===05

Stanley Sacks, Esq.
Attorney for Defendant

(Name and Address of Defendant)
111 87th Street
Virginia Beach, VA. 23451

THE DEFENDANT ENTERED A PLEA OF:

[_ guilty _ nolo contendere] as to count(s)_____and
xx not guilty as to count(s)

THERE WAS A:
[_ finding _ verdict] of guilty as to count(s) 2,3,4,5,6,7,8,9, 10,11,12,13,14,15,16,17,18,19,20, 21,22,23,24,25,26,27,28,29,30,31, 32,33,34,35,36,37,38,39,40,41,42, 43,44,45,47,48,69,70,71

THERE WAS A:

[_ finding _ verdict] of not guilty as to count(s)_____
_ judgment of acquittal as to count(s)_____
The defendant is acquitted and discharged as to this/these count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF:
violation of Title 18 U.S.C. §1343 & 2 - Wire Fraud;
violation of Title 18 U.S.C. §152 & 2 - Bankruptcy Fraud;
violation of Title 18 U.S.C. §1961,1962(c),1963 - Racketeering activities affecting interstate commerce;
violation of Title 18 U.S.C. §1961,1962(d),1963 - Conspiracy re racketeering activities (re:T.18:1343);
violation of Title 18 U.S.C. §1014 & 2 - False Statements;

IT IS THE JUDGMENT OF THE COURT THAT:

AS TO EACH OF COUNTS 2 through 36:
The defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of TWO (2), unless sooner released by operation of law. Said sentences to run concurrently one with the other.

AS TO EACH OF COUNTS 37 through 45:
The defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of TWO (2) YEARS, unless sooner released by operation of law. Said sentences to run concurrently with each other but consecutively with Counts 2 through 36.

In addition to any conditions of probation imposed above, IT IS ORDERED that the conditions of probation set out on the reverse of this judgment are imposed.

UNITED STATES DISTRICT COURT for
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

United States of America vs.

FRANK E. BUTLER, III,

Defendant.

Docket No. CR. 88-53-N

JUDGMENT AND PROBATION/COMMITMENT ORDER

AS TO COUNT 47: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of TWO (2) YEARS, unless sooner released by operation of law. Count 47 is to run consecutively with Counts 2 through 36 and Counts 37 through 45.

AS TO COUNT 48: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of ONE (1) YEAR, unless sooner released by operation of law. Count 48 is to run consecutively with the other counts.

AS TO EACH OF COUNTS 69, 70, 71: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of ONE (1) YEAR, unless sooner released by operation of law. Said sentences to run concurrently with each other but consecutively with the other counts.

The defendant is directed to pay RESTITUTION in the amount of $100,000.00. $50,000.00 is to be paid within six (6) months of today and the balance of $50,000.00 is to be paid within one (1) year of today. Payments shall be made under the direction of the Probation Office to either Landbank Bankruptcy Trustee or the F.S.L.I.C.

AO 245 (Reverse) Page 3 of 3

CR. 88-53-N-
U.S.A. vs. FRANK E. BUTLER, III

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;
(2) associate only with law-abiding persons and maintain reasonable hours;
(3) work regularly at a lawful occupation and support your legal dependent, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;
(5) notify your probation officer immediately of any changes in your place of residence;
(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $1500.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) 9,10,11,12,13,14,15,16,22,26,27,28, 30,31,32,33,34,35,36,37,38,39,40,41 42,43,44,45,47 & 48 at the rate of $50.00 per count.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount imposed as a fine, restitution for special assessment. The defendant shall pay to the clerk of the court any amount imposed as a

cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

The defendant is continued on his present bond. Hearing on motion for bond pending appeal set for January 13, 1989 at 9:00 a.m.

January 6, 1989
Date of Imposition of Sentence

Signature of Judicial Officer

J. Calvitt Clarke, Jr., U.S. District Judge
Name and Title of Judicial Officer

January 6, 1989
Date

A TRUE COPY, TESTE:
Doris R. Casey, Clerk
By_____
Deputy Clerk

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on to_____ at
Date

, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case.

_____

United States Marshal

By_____
Deputy Marshal

GOODMAN & COMPANY
Certified Public Accountants
500 Plume Street East
P.O. Box 3297
Norfolk, Virginia 23514
Telephone (804) 622 6366

M. Lu Goodman, CPA. (1905-1961)

D. Vernon Norman, CPA
Morton Goldmeier, CPA
A. Francis Ritter, CPA
Irwin Berger, CPA
Denis A. Wilson, CPA
Julian H. Gutterman, CPA
Roger L. Frost, CPA
Robert I. Low, CPA
Donald M. Dale, CPA
Daniel J. Klavans, CPA
Phillip J. Howell, CPA
John W. Kerr, Jr., CPA
Errol S. Lifland, CPA
Bruce C. Holbrook, CPA
George Rochkind, CPA
Michael A. Thomas, CPA
Thomas H. Wilson, CPA
Pat J. Viola, CPA
Richard P. Pontynen, CPA
Alvin A. Wall, CPA

Member CPA Associates
Associated Offices In
Principal U.S. and
International Cities

Virginia Offices
Norfolk, Richmond

June 19, 1985

Board of Directors
Landbank Equity Corporation
1206 Laskin Road
Virginia Beach, Virginia 23451

Gentlemen:

During the course of our engagement for Landbank Equity Corporation ("Landbank") certain documents we have reviewed and statements made to us by Landbank employees have indicated that Landbank and some of its employees and agents may have committed violations of federal and state laws in the past. These possible violations seem to include, (without attempting an exhaustive list): obtaining money by fraud, fraud by wire and by mail, violation of the federal RICO Act (18 U.S.C. § 1961), and criminal violations of the Truth in Lending Act. Some of the specifics relating to these apparent violations are set forth in our letter to you of last Friday, June 14, 1985, to which we have not received any reply.

It now seems clear that continuing our work at Landbank will be likely to reveal further evidence of possible legal violations, and it is imperative that Goodman & Company be

able to assure itself that (1) Goodman & Company is not assisting a company which is engaged in ongoing violations of the law, and (2) Goodman & Company is not in any way assisting in the concealment of past violations of the law.

We wish to emphasize that we are aware that the commission of a crime involves many elements, often including difficult questions of knowledge and intent, and as accountants we do not purport to possess any special expertise in such matters, nor do we seek to sit in judgment over the acts of employees of our clients. But legal duties as well as our position and reputation as certified public accountants motivate us to be especially careful in establishing a clear understanding with the client regarding our respective rights and responsibilities in continuing to work in a company after receipt of evidence indicating that substantial violations of the law may have occurred there.

We need the commitment of the Board of Directors of Landbank that:

1. Appropriate modification of past business practices have been made so as to guarantee that legal violations are not continuing.

2. Goodman & Company will have unrestricted access to company documents, personnel, customers, investors and outside advisors, including accountants, attorneys and other consultants.

3. Goodman & Company will take no action or aid or conceal any past, present of future violations of the law and that information obtained by Goodman & Company in its work will be under no requirement of confidentiality with respect to any public body having responsibility for enforcement of any law.

4. Landbank will cooperate in executing any confirmations or tests that Goodman & Company feels is appropriate.

5. Some appropriate notification has been given to investors not to rely on information previously furnished them.

Very truly yours,

GOODMAN & COMPANY

By _____
Errol S. Lifland

GOVERNMENT EXHIBIT ADV-8B

can finish in that time or shortly after? If you think you may be longer, you can take him then.

MR. ANDREW SACKS: Your Honor, I hope I won't be very long, but to avoid the possibility if I might underestimate how long, if we could take a break now, I would appreciate it.

THE COURT: Step down, but don't communicate with anybody.

THE WITNESS: What time should I come back, Your Honor?

THE COURT: We'll call you, probably be ten minutes, something like that, but you can go down the hall to the rest rooms.

THE WITNESS: Thank you.

(Whereupon, the jury was brought

out)

THE COURT: We'll take a brief recess.

(Recess)

THE COURT: Let the record show both defendants are present and with counsel.

MR. STANLEY SACKS: Your Honor, please may I take up something with the Court briefly?

THE COURT: All right.

MR. STANLEY SACKS: Your Honor, there are some witnesses on the list that probably - I don't think they are the next two or three witnesses, but they are likely to get to some of them before lunch and, certainly, this afternoon. Two of those witnesses that the government

intends to put on are accountants from Goodman and Company, and then at least one or two lawyers, attorneys that I would think this afternoon are anticipated on the list. The question that is raised is, apparently, when the accountants, Goodman and Company, got into the reports, they came in and reviewed the reports and practices of Landbank and the attorneys somehow got into that at the same time and Landbank was written letters, several letters that the government intends putting in that tell Marika or Landbank or the Board of Directors of Landbank that - based on our review, it's our opinion that there may have been or

that there are violations of law such as fraud by wire and by mail, violations of the Federal RICO Act and criminal violations of Truth in Lending Act.

Your Honor, I don't think we would have any objection into evidence the fact that they reviewed and they said, you know, we believe that maybe there have been some violations of law, because what they were telling them is -- Your Honor, our concern is that if somebody takes the stand as an attorney or accountant, in essence, they would be expressing an opinion on that there was a violation of the RICO Act, for example, or were violations of the wire fraud act. Now, I

believe that experts can under many conditions testify to the ultimate issue, but you get awful close to inadmissible. There's a provision of Rule 704, the second paragraph, having to do with criminal cases and having to do with that its not admissible. Where there's intent required the ultimate issue is for the trier of facts, somebody - an expert can get on the stand and say, in essence, that they had the criminal intent or the knowledge and that, in his opinion, they were violating RICO. For example, there were some cases, Your Honor, I don't have them with me today, that construe that fairly broadly. My understanding is that -- express

amendment to 704, Congress amended it so that it specifically does not allow the ultimate issue, opinion of an expert in a criminal case having to do with intent or knowledge. I think that's what we'd be getting into if we allow -- I can just see how the jury could be mislead, Your Honor, that an accountant believed that they violated the RICO Act and, in fact, Goodman and Company says in one of their letters - we are not experts on it, and we know there are a lot of things about knowledge and intent. But just that expert opinion, Your Honor, that I don't think is in this criminal case ought not have a place. The attorneys are going to say the same thing and we

don't need a jury -- obviously, if an expert is to take the stand in a criminal case such as this, such a complicated case with these facts, Your Honor, and an expert give that opinion as to the ultimate issue.

So I repeat, in conclusion, why I say to Your Honor, I don't have any objection to - and I think they can cover the same grounds and just not put those letters in with the specifics and with their witnesses that we look at -- We felt there were possible violations of law we warned them about it, told them not to do it. Violations of law, that's all right, but the specifics we have objection to.

THE COURT: Let me ask Mr.

Metcalfe and company this, when do you expect to get to these witnesses.

MR. METCALFE: I think the first witness to testify to the specific letter would be on after lunch. I'd be glad to tell the Court now the factual background.

THE COURT: My thought is, why don't we reconvene here at 1:30 and take it up at that time. I hate to rush you all through lunch, but this poor jury certainly has been imposed on and I would rather use our time than theirs. So we'll address the problem at that time and that will give you all an opportunity to get your objections in the record, too.

Mr. Sacks. You might want to call your

Your Honor, I don't know whether you had any chance to --

THE COURT: I've tried to look at all the authorities that were given to me.

I understand that the objectionable testimony will be similar to that in the letter of Goodman and Company, June 19, 1985, addressed to the Board of Directors of Landbank Equity.

MR. STANLEY SACKS: Yes, Your Honor. There's another letter that I don't have here, one of June 14th, 1985. Do you all have that?

MR. METCALFE: Your Honor, the one that you have, the June 26 letter is the final confirmation. They didn't get a good response to

the June 14th letter, it confirms they physically met and presented that letter. The testimony wil be they presented that letter.

MR. DONNELLY: I had three - June 12, 14 and 19.

MR. STANLEY SACKS: Let me look at them.

MR. METCALFE: You want the June 12th and 14th letters, Mr. Sacks?

MR. STANLEY SACKS: Yes. If they don't mention these actual specific possible violations, criminal violations, then I'm not raising anything as to them, I'm not, and I'm not speaking, of course, for Mr. Donnelly. The 14th letter doesn't seem, Your Honor, to have what I'm concerned about.

THE COURT: Well, I don't have the letter of the 14th, but if it doesn't bother you --

MR. STANLEY SACKS: It may bother Mr. Donnelly, the June 19th letter you have, Your Honor, and if there are any other - it seems I have seen at least another letter.

THE COURT: There is a letter of June 26 that says pursuant to the objection, the matters raised in the letter of June 19th. We did meet with you all and you all didn't meet to adopt other recommendation, so we're quitting.

MR. STANLEY SACKS: I don't have any objection to any exhibit, any letter, any document that doesn't set out what they do the type of

thing they do in the June 19th letter in that first paragraph, these possible violations seem to include an exhaustive list. I don't know if you have that before you.

THE COURT: Well, I have the letter of June 19th.

MR. STANLEY SACKS: They say obtaining money by fraud, fraud by wire and by mail, violation of the federal RICO Act, (18 U.S.C. 1961), and criminal violations of the Truth in Lending Act. I think while you have the letter in front of you, Your Honor, if you will skip down to the last paragraph on that, "We wish to emphasize that we are aware that the commission of a crime involves many elements, often including

difficult questions of knowledge and intent, and as accountants, we do not purport to possess any special expertise in such matters, nor do we seek to sit in judgment over the acts of employees of our clients." I think that's significant what they say. But it appears to us, Your Honor, that that evidence would tend to be opinion evidence, that in the opinion of the writer of that letter, or anybody else who is going to testify, that's what they said at a meeting, if some attorney gave the same opinion, and I think they have two attorneys who are going to say it was their opinion. That's an opinion, Your Honor, that I would urge to you is not admissible for

two reasons, the first is Rule 702. And I made reference just before lunch in the helpfulness test, that there's a body of law that every opinion sought to be introduced by an expert is not admissible. It is only if it is helpful. That is, if it's something that the jurors can't make those decisions themselves. And I'm reading from Weinstein's Evidence Manual, and he says the helpfulness test also embodies the principles set forth in Rules 401 and 403. 401, of course, is relevance and 403 is that, you know, probative value against prejudice and so forth, expert testimony that is not relevant is not helpful, nor will such evidence assist the trier

of fact if it is overly confusing, more prejudicial than probative or needlessly time consuming. The Court will assume relevancy will have to proceed on a case-by-case basis. It's conclusions will depend on the contracts and evaluation of the state of knowledge presently existing on the subject of the proposed testimony and, two, on the Court's appraisal of the facts of the case. That, Your Honor, is under Rule 702, that at the threshold I think the government has to overcome that they need these opinions of attorneys and accountants in addition to what they have already proved. They have proved the facts in evidence, Your

Honor, as to what was done. And it's just a question of Your Honor instructing him as to what they accept and whether that was done. And there's no question about fraud in the case. The question is a case of whether these defendants were parties to that. But the jury doesn't need any more. They don't need anybody's expert opinion that that was fraud and that's about what it amounts to, that's taking the house and putting --

THE COURT: I don't think that would be the reason they would be submitting the evidence. The submission of evidence, I assume, would be notice to the defendants and, thereafter, their continuing

the same course of action as pertinent to the question of intent. I would assume that's what they are driving at.

MR. STANLEY SACKS: Well, Your Honor, these letters are June, 1985 and August, 1985.

THE COURT: The June letter is certainly before some of the sales we have heard about.

MR. STANLEY SACKS: Well, it may be true, Your Honor, but I ask you to weigh, also, because the 403 balancing process involves, also, whether it's necessary, whether they have to have that on top of all the evidence they have, whether they have to bring in something that is, that can, that is so wrought with

prejudice because you're not trying - the men you're trying here, Your Honor, or who are being tried, are not the people that committed -- they weren't told that. I speak for Mr. Butler. Mr. Butler didn't get that letter. He didn't get any knowledge. He wasn't told. He wasn't put on notice. He wasn't at the meeting, didn't get any of those letters. So the potential for prejudice to Frank Butler is extremely high. It's probative value. And the reason for -- if the government urges for knowledge and intent, they can't even show he knew about it. So that, plus it's not necessary to have that opinion in on top of everything else they

have, and under 403, balancing, Your Honor, I would urge to you that it fails the balancing test. The government sites a civil case where they balanced whether or not in a civil suit against a manufacturer, I guess it was, on the dangers of whatever they were manufacturing - prior complaints. And the Fourth Circuit balanced that, and it went to necessity, and found that in that case it was necessary because it really -- they said if it didn't have that in the case, they wouldn't have enough evidence to get the negligence issue to the jury, and that the Fourth Circuit found that it was necessary, but they balanced it even in the civil case, put the

balancing test to it.

In this case that cannot be said. They don't need this highly prejudicial evidence as to - at least Mr. Butler, and the other gentleman's counsel will speak for him, who didn't get notice of it. So the very reason for existence does not exist in the case of the defendant, Mr. Butler.

In addition to that, Your Honor, I think that it's in Rule 704 as to opinion evidence because that's what it is. They are saying, in fact, the accountant says, "possible violations," and then he puts a disclaimer in there saying - I really can't say that.

THE COURT: Let me find this out

-- are you all talking about putting the letter in or just the

Honor.

THE COURT: May the witness be free to leave the courthouse?

MR. METCALFE: Yes, sir.

THE COURT: Thank you very much.

MR. METCALFE: United States calls Donald Dale, sir.

THE COURT: Who?

MR. METCALFE: Donald Dale.

Donald Dale, called on behalf of the Government, was sworn and testified on his oath as follows:

DIRECT EXAMINATION

BY MR. METCALFE:

Q. Mr. Dale, would you tell the jury your name and where you're employed, sir?

A. Yes, I will. My name is Donald Dale. I'm a certified public

accountant. I am a partner in the firm here in Norfolk, Goodman and Company, CPA's.

Q. How long have you been employed as a CPA, sir?

A. Approximately 24 years.

Q. And were you involved in the Goodman and Company engagement with Landbank?

A. Yes, I was.

Q. And what was your duty with regards to that engagement?

A. I was the partner in charge of the initial phase of that engagement for the management advisory services engagement that we did for Landbank. Mr. Reuben Allen, who I think has testified before me, was my immediate subordinate on

that. He was not a partner, so he could not sign engagement letters, contracts, that was primarily my function, in charge of him.

Q. Did you subsequently have duties with regards to the Landbank engagement as the quality control partner?

A. Yes, I did.

Q. Would you explain that?

A. What I would do there, although in this particular engagement we never really got that far, is I would review all of the reports we would render to the clients - records, letters, things of that nature.

MR. METCALFE: If I could hand the witness ADV-8B and ADV-13A.

BY MR. METCALFE:

Q. Do you recognize those, sir, as letters that were created in the ordinary course of Goodman and Company's business and in relation to the Landbank Equity engagement?

A. Yes, sir, I do.

MR. METCALFE: And I would move them into evidence, Your Honor.

THE COURT: ADV-8B?

MR. METCALFE: Yes, sir.

MR. STANLEY SACKS: If Your Honor please, as to 8B, I have no objection to the identification by this witness who has identified them, but I object to the introduction because the letter, 8B, that I have is signed by somebody else. It's another person's letter,

and as far as cross-examination I don't think -- I don't object to identification, but I object to admission.

THE COURT: All right.

BY MR. METCALFE:

Q. Mr. Dale, approximately how long was the Landbank engagement prior to the creation of the June 19th letter? That's ADV-8B.

A. It was almost one month exactly.

Q. And did you review with Mr. Lifland and with others, with regards to that engagement, the engagement they and you had developed with regards to both the operations and the financial status of Landbank Equity?

A. I would have reviewed our records to Landbank.

Q. And did you then contact any attorney with regards to the information that was developed?

A. Yes, we did.

Q. And as a result of your discussions with your attorney, did you then produce the June - you, yourself, produce the June 19th, 1985 letter, ADV-8B, that has a signature letter for Mr. Errol S. Lifland?

A. Yes, with our attorney's help.

THE COURT: Are your saying you are the author of the letter?

THE WITNESS: Your Honor, I would be a part author, several of

us worked in writing this letter, including our attorney

BY MR. METCALFE:

Q. And did you subsequently have occasion to, you and others from Goodman and Company, to personally present this letter to top management at Landbank?

A. Yes, we did. The June 19th letter we delivered personally.

MR. METCALFE: I would move into evidence ADV-8B.

MR. STANLEY SACKS: It may well be, but he has used the expression we delivered it and we -- I don't think there's enough foundation for its admission. It's signed by somebody else who needs to be asked. He may need to be asked

about. The man has said --

THE COURT: He said he co-authored it. Is that correct?

THE WITNESS: Yes.

THE COURT: I overrule the objection.

MR. STANLEY SACKS: We except.

THE CLERK: Admit?

THE COURT: Yes.

(Exhibit No. ADV-8B received into evidence)

THE COURT: Ladies and gentlemen of the jury, let me talk to you a minute about this. At the proper time, after all the evidence is in, and counsel have argued the case to you, I'm going to charge you as to the law of the case.

I will tell you at that time the various elements that the government has the burden of proving beyond a reasonable doubt before a person can be convicted of any particular crime charged in the indictment. There will be several elements that the government will have to prove in respect to any particular charge. One of those elements will have to do with intent and knowledge. That is intent to do the acts that they are charged with, and knowledge that they were doing the acts. And that's to keep an innocent person from being convicted because he happens to stumble into something or take some action.

BY MR. METCALFE:

Q. Mr. Dale, your letter of June 19th is directed to the Board of Directors of Landbank Equity; is it not?

A. Yes, it is.

Q. Would you tell us how that was presented to the Board of Directors, who was present from Landbank, who was present from Goodman and Company and, if you know, who the other persons were who were present, if you can identify them? And you have might have occasion to look at your June 26th letter if you need to to refresh your recollection.

A. Yes. It was presented in person at the offices of Landbank in

Virginia Beach, and I will have to refer to the June 26th letter to tell you who was present at that meeting.

Q. All right.

A. According to our letter, which was written June 26, present at the meeting was Marika Runnells, Ross Schumann, T. C. Lee, William Babalas, Esquire, Brian Ball, Esquire, Donald Dale, that's myself, Errol Lifland, Reuben Allen, one of our employees, and Henry St. John Fitzgerald, Esquire, our attorney.

Q. And, if you would, if you turn back to the June 19th letter, if would you read that to the jury.

A. Addressed to the Board of Directors of Landbank Equity

Corporation and dated June 19th, 1985.

"Gentlemen: During the course of our engagement for Landbank Equity Corporation ("Landbank") certain documents we have reviewed and statements made to us by Landbank employees have indicated that Landbank and some of its employees and agents may have committed violations of federal and state laws in the past. These possible violations seem to include, (without attempting an exhaustive list): Obtaining money by fraud, fraud by wire and by mail, violation of the federal RICO Act (18 U.S.C. 1961), and criminal violations of the Truth in Lending Act. Some of

the specifics relating to these apparent violations are set forth in our letter to you of last Friday, June 14, 1985, to which we have not received any reply.

"It now seems clear that continuing our work at Landbank will be likely to reveal further evidence of possible legal violations, and it is imperative that Goodman and Company be able to assure itself that (1), Goodman and company is not assisting a company which is engaged in ongoing violations of the law, and (2), Goodman and Company is not in any way assisting in the concealment of past violations of the law.

"We wish to emphasize that we

are aware that the commission of a crime involves many elements, often including difficult questions of knowledge and intent, and as accountants, we do not purport to possess any special expertise in such matters, nor do we seek to sit in judgment over the acts of employees of our clients. But legal duties as well as our position and reputation as certified public accountants motivate us to be especially careful in establishing a clear understanding with the client regarding our respective rights and responsibilities in continuing to work in a company after receipt of evidence indicating that substantial violations of the law may have

occurred there.

"We need the commitment of the Board of Directors of Landbank that, (1), Appropriate modifications of past business practices have been made so as to guarantee that legal violations are not continuing.

"(2), Goodman and Company will have unrestricted access to company documents, personnel, customers, investors and outside advisors, including accountants, attorneys and other consultants.

"(3), Goodman and Company will take no action or aid or conceal any past, present or future violations of the law and that information obtained by Goodman and Company in its work will be under no

requirement of confidentiality with respect to any public body having responsibility for enforcement of any law.

"(4), Landbank will cooperate in executing any confirmations or tests that Goodman and Company feels is appropriate.

"(5), Some appropriate notification has been given to investors not to rely on information previously furnished them.

"Very truly yours, Goodman and Company." And this is signed by Errol S. Lifland who is one of my partners on the engagement - partner on the Landbank client engagement.

Q. Mr. Dale, in seeking the advice of counsel, under the

circumstances, and given the information you had developed in your time at Landbank, were you following guidance that is --

THE COURT: Well, I have told the jury now that they are not to put any - draw any conclusions about the legality or illegality of any action, and I'm not going to have you putting any legal advice in with respect to this. The letter speaks for itself, and that's as far as you can go.

MR. METCALFE: That's not where I'm headed, Your Honor.

BY MR. METCALFE:

Q. My question pertains to the cannons or

letter, withdrawing this letter, continuing with the engagement, doing something other than withdrawing from the engagement in this manner. It wasn't a very happy meeting from my viewpoint.

Q. And from your viewpoint, did you ever get a satisfactory response from anyone at Landbank that would justify your continuing the engagement?

A. No, we didn't. That's what prompted our June 26 letter, which we wrote to make certain that there was no question in their mind, but that we had withdrawn from the engagement.

MR. METCALFE: I would move in ADV-13A, Your Honor, the June 26,

letter.

THE COURT: All right.

(Exhibit No. ADV-13A received into evidence)

BY MR. METCALFE:

Q. And, if you would, Mr. Dale, if you would read that.

THE COURT: Let me say one other thing - June the 19th, I would call your attention insofaras you may consider into matters of intent and knowledge that the letter is dated June 19th, 1985, and you will consider that in respect to any action you may have found the defendants guilty of or any co-conspirators, if you find conspiracy to have existed, that it's the date when this letter may have been

effective as to any knowledge or intent.

Go ahead.

MR. METCALFE: Yes, sir.

BY MR. METCALFE:

Q. Mr. Dale, if you would read your June 26 letter.

A. June 26, 1985, addressed to the Board of Directors as Landbank Equity Corporation in Virginia Beach, Virginia.

"Gentlemen: Following our letter to your of June 14, 1985, and pending a proper resolution of the questions raised in that letter, Goodman and Company began to wind up its immediate activities at Landbank Equity Corporation ("Landbank"), return company materials in its possession and leave the Landbank

offices. That process was completed by noon on Tuesday, June 18th, 1985, and a meeting with Marika Runnells and the Landbank attorneys was requested on an urgent basis for that day or evening or on the next day. The meeting we requested was scheduled for Wednesday afternoon, June 19, 1985, at the company offices. And we appreciate your willingness and that of your attorneys to meet with us within 24 hours. That meeting was attended by Marika Runnells, Ross Schumann, T. C. Lee, William Bayliss, Esquire, Brian Ball, Esquire, Donald Dale, Errol Lifland, Reuben Allen and Henry St. John Fitzgerald, Esquire.

At that meeting we delivered to you and reviewed in detail our letter of June 19, 1985, which outlined our position.

"Unfortunately, our meeting of June 19, 1985, did not indicate that Goodman and Company will received the assurance it must have as a basis for resuming its work. Accordingly, Goodman and Company is giving you herewith, its final bill for services which have been charged against the retainer. If in the future you feel that Goodman and Company services would be helpful and that your internal situation has stabilized sufficiently for us to undertake a new engagement, please contact us.

"Very truly yours, Goodman and Company." And signed by Errol Lifland, who was our partner in charge of the operation on a day to day basis.

MR. METCALFE: No further questions from me, if you'll answer any question of other counsel.

CROSS-EXAMINATION

BY MR. DONNELLY:

Q. Mr. Dale, following your letter of June 26, 1985, I take it Goodman and Company had no further involvement with Landbank?

A. None to my knowledge.

Q. Could you give us an estimate of whether or not Goodman and Company could have prepared at that

time an audited financial statement for Landbank Equity?

A. In my opinion, absolute not. We were not engaged to do that.

Q. Do you have any estimate as to how many man hours --

THE COURT: The question wasn't whether you had been engaged; if you had been engaged to do it, could you have done it?

THE WITNESS: Oh, I'm sorry. Since we were not engaged to look at that, I am unable to answer the question. We never assessed that possibility.

BY MR. DONNELLY:

Q. You could not give us an estimate as to how many man hours it would take to perform that task or

how many people?

A. Not at this point.

Q. Would you agree it would have been a sizeable task for one man to accomplish?

A. It may have been.

Q. You didn't get in that far?

A. We didn't. Our engagement was an operational study and not an audit or accounting engagement.

Q. The operational study is to suggest changes or modifications?

A. Improvements in operating methods, procedures, paper flow, loan jacket handling, things like that, that was the initial engagement.

Q. Assuming they have done that second step, would they come in and

do an audited examination?

A. No, that was not contemplated as a second step.

Q. Do you know at your meetings - did the financial statement of May, excuse me, March, 1985 come up?

A. Not at any meeting I was present at. I don't recall it.

Q. Do you know whether or not Goodman and Company had a position relative to that financial statement?

A. No, I do not.

MR. DONNELLY: I have not further questions, Your Honor.

THE COURT: All right. Mr. Sacks?

CROSS-EXAMINATION

MR. STANLEY SACKS:

Q. Mr. Dale, I think you were in charge of the engagement?

A. I was the administrative part in charge of the management advisory services department.

Q. Did that require you to actually physically go to the Landbank premises? Did you ever do that?

A. Yes. I went there for the - when we gave our initial engagement letter and when we gave our withdrawal letter on June the 19th.

Q. So the men who were associated, who were doing the work, is it your understanding they did their work at the Landbank offices on the Landbank premises?

A. Yes, sir.

Q. Now, were you present at the -- apparently there was a meeting, no a letter of June the 14th, 1985, that is mentioned in the June 19th letter; you read us the June 19th letter?

A. Yes.

Q. Was the first letter, Friday, June the 14th, was it presented to the Board of Directors or to somebody in person, if you know?

A. It's my recollection that the June 14th letter, which is neither of the ones that's introduced into evidence, was delivered, coincidentally, with the June 19th letter.

Q. Well, you --

A. That's my recollection

Q. Even though they were dated - one, June 14, and one - June 19, but you saw this, maybe you should look at ADV-8B, if the marshal would hand you that again.

A. The last sentence of the first paragraph of the June 19th letter says, "some of the specifics relating to these apparent violations are set forth in our letter to you of last Friday, June 14th, 1985, to which we have not received any reply."

Q. Doesn't that seem to infer that a letter of June the 14th was sent or delivered setting out some specifics, but as of June the 19th, you hadn't heard from anybody?

A. Yes, sir. That must have been the case.

Q. Now, do you know to whom the June 14th, that is the first letter, was presented? Was it the board? If you know.

A. If I can refer to some notes I would know.

Q. Absolutely, whatever you have that would refresh your recollection.

A. We have a letter on our letterhead dated June 14, 1985, to the Board of Directors at Landbank Equity Corporation in Virginia Beach, which is the letter referenced in Government Exhibit ADV-8B.

Q. So it would be pretty certain

it went to the board. But you probably are not able to say if it went into a meeting, who was present at the meeting - is what I'm really trying to determine, if you know who the got the letter of June 14th, who knew, if you know, what you all were telling these folks?

A. I do not know.

Q. Now, we get to the letter of June the 19th, 1985. That's the letter you have read to us today. Was that delivered? I think you said that was delivered in person to people at a board meeting at Landbank?

A. It was delivered in person in the board room. I'm not sure it was a meeting.

Q. Were you there?

A. Yes.

Q. Now, you do know who was there and who got that letter where you said "very well may be possible violations of law"?

A. Yes.

Q. Marika Runnells, Mr. Schumann, T. C. Lee, Mr. Bayliss, Mr. Ball, yourself, Mr. Lifland from your firm, and Reuben Allen, who works for you, and Mr. Fitzgerald of Goodman and Company, Attorney?

A. Those are the individuals that were present.

Q. Mr. Butler over there at the end wasn't there was he?

A. I've never seen Mr. Frank Butler before today.

Q. The Messrs. Bayliss and Ball, who did you understand them to be?

A. Attorneys for Landbank Equity.

Q. Those were the attorneys out of a Richmond Law firm?

A. That's correct.

Q. Skipping in time for just a minute, when you did send a letter of withdrawal, I think on June 26, Goodman and Company had gotten to the point you weren't getting the assurances, and you all were going to get out of it?

A. That's correct.

Q. In your June 26 letter, you have said - we appreciate your willingness for you and your attorneys to meet with us, something

to that effect; did you not?

A. That's correct.

Q. When you refer to you and your attorneys, you were talking above Messrs. Bayliss and Ball?

A. They were the attorneys we referenced, yes.

Q. Just a couple more questions, please. I think you make it clear in your testimony, your letter,